EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995 AND S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT MORRINSVILLE

FAM-2016-039-000088
[2017] NZFC 474

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ELIZABETH YATES] Representative of [OLIVIA YATES] Applicant
AND	[GRACE HUDSON] Respondent

Hearing:	18 January 2017
Appearances:	A King for the Applicant J Niemand for the Respondent
Judgment:	27 January 2017 at 4.00 pm

RESERVED JUDGMENT OF JUDGE D R BROWN
[Application to Rescind Temporary Protection Order]

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[1] The respondent's application to rescind a without notice protection order made against her raises in raw form the question whether a parent of a 15 year old child can obtain a protection order for that child against the child's wishes.

Background and history

[2] The proceedings were begun by [Elizabeth Yates] ("Ms [Yates]") on 2 December 2016. Ms [Yates] applied "as a representative on behalf of" [Olivia Yates] ("[Olivia]"), her 15 year old daughter for a without notice protection order. The respondent [Grace Hudson] ("Ms [Hudson]") against whom the order was sought is [relationship deleted].

[3] At this interlocutory stage of the proceedings, I describe the events leading up to the application as neutrally as possible, as follows.

[4] Olivia is the [details deleted] children of Ms [Yates]. They live in a conventional family home in [location deleted]. Ms [Hudson] is a [employment details deleted] working in the youth area. She lives in [location deleted] with her partner and her two children [Faith] and [Louis].

[5] Both [Faith] and [Olivia] attend the same school, [school name deleted].

[6] The date this commenced is not clear, but for about the last year or so a pattern developed of [Olivia] spending her weekends at Ms [Hudson]'s home and her week day nights at her own. Initially and for some time this was accepted by Ms [Yates]. Among other reasons, Ms [Yates] deferred to Ms [Hudson]'s "expertise" with young people to accept that her arguably troubled daughter was best left as far as possible to exercise her own choices.

[7] [Olivia]'s reluctance to stay at her home intensified and her time at home shrank to two nights a week. It was then reported by Ms [Hudson] that [Olivia] did not want to go home at all. Ms [Yates] demanded that [Olivia] come home. [Olivia] came home for some days but then disappeared.

[8] CYFS and the police became involved.

[9] Ms [Yates] took [Olivia] to live with her grandparents at [location deleted]. In Ms [Yates]'s account [Olivia] "has had all telephone, access to internet and social media cut off". At the time of her application however Ms [Yates] was aware that there were continuing attempts by [Faith] to contact [Olivia] and there had been one attempt by Ms [Hudson]'s partner.

[10] Ms [Yates]'s application was made on the basis that Ms [Hudson] and her family had "done their best to alienate [Olivia] from her own family" and were undermining the fragile stability of the situation.

[11] The application made by Ms [Yates] was framed as an application *by Ms [Yates] on behalf of [Olivia]*. There was no formal application to appoint Ms [Yates] [Olivia]'s representative.

[12] The Duty Judge made an order that Ms [Yates] be "appointed as a representative of her daughter".

[13] Ms [Hudson's]'s response is, not unexpectedly, that [Olivia] *is* alienated from her family and she and her daughter have done no more than cautiously and conservatively support the child and the child's ultimate wishes.

The application

[14] The application by Ms [Hudson] is made under Rule 34(c) of the Family Courts Rules which provides that where an order is made on a without notice application "each person against whom the order is made may, at any time, make an interlocutory application to a Judge to have the order varied or rescinded".

[15] Family Courts are disproportionately required because of safety, emergency and fast moving events within families to make and issue without notice orders. Rule 34(c) does not require or entitle an applicant to argue the substantive merits of the situation, particularly if there are contested issues or evidence. But the Rule does require the Court to be open to a reassessment of the situation if, following service, the respondent is able to demonstrate a fact or proposition which, if known to the Judge

who made the without notice, would have dissuaded the Judge from making an order without notice.

The law

[16] Section 9 of the Domestic Violence Act provides:

> **9 Applications by minors**
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> (1) Subject to subsections (2), (2A) and (4) of this section, a minor may make an application for a protection order under this Act.
>
> (2) A minor under 16 years of age must make the application for a protection order by a representative pursuant to rules of Court.
>
> (2A) Subject to sections 11 and 12, a minor aged 16 years may make an application either on his or her own behalf under subsection (4), or by a representative pursuant to rules of Court.
>
> (3) Nothing in subsection (2) or subsection (2A) of this section prevents a minor under the age of 17 on whose behalf an application for a protection order is made by a representative from being heard in the proceedings; and where the minor expresses views on the need for and outcome of the proceedings, the Court must take account of those views to the extent that it thinks fit, having regard to the age and maturity of the minor.
>
> (4) Subject to sections 11 and 12 of this Act, a minor—
>
> (a) who is aged 17 years or over; and
>
> (b) Who wishes to apply for a protection order—
>
> must make the application on his or her own behalf, without a next friend or guardian *ad litem*, and orders may be made on the application, and enforced, as if the minor were of full age.

[17] Sections 11 and 12 of the Act (which deal with applications by persons "lacking capacity" or who are unable to apply) have no application to this proceeding because they are restricted to applications by persons over the age of 16 and [Olivia] is 15.

[18] For the purposes of this proceeding, a "representative" for the purposes of s 9 will be as defined in s 8 of the Family Courts Rules:

> (a) A person treated as appointed as a next friend for a minor under Rule 90B; or

(b) a person appointed as a litigation guardian for a minor under Rule 90C.

90B **Appointment of next friend for minor**

A person is treated as appointed as the next friend for a minor if the person has filed in the court—

(a) an affidavit showing that he or she—

(i) is able fairly and competently to conduct proceedings on behalf of the minor; and

(ii) does not have interests adverse to those of the minor; and

(b) an undertaking to be responsible for any costs awarded in the proceedings against the minor.

90C **Appointment of litigation guardian for minor**

(1) This rule applies if a minor does not have a next friend or litigation guardian within the meaning of paragraph (a)(ii) of the definition of litigation guardian in rule 8.

(2) The court or Registrar may appoint a litigation guardian if the court or Registrar is satisfied that—

(a) the person for whom the litigation guardian is to be appointed is a minor; and

(b) the litigation guardian—

(i) is able fairly and competently to conduct proceedings on behalf of the minor; and

(ii) does not have interests adverse to those of the minor; and

(iii) consents to being a litigation guardian.

(3) In deciding whether to appoint a litigation guardian, the court or Registrar may have regard to any matters the court or Registrar considers appropriate, including the views of the person for whom the litigation guardian is to be appointed.

(4) The court or Registrar may appoint a litigation guardian under this rule at any time—

(a) on the court's or Registrar's own initiative; or

(b) on an interlocutory application made with or without notice by any person, including a person seeking to be appointed as litigation guardian.

[19] The fact that no formal application was made for Ms [Yates]'s appointment as [Olivia]'s representative is of no consequence, the Court being empowered by Rule 90C(4)(a) to such an appointment of its own initiative.

[20] In *W v B*,[1] Judge Mather considered the appointment of a mother as the representative for twin boys aged 14, one of whom was in a sexual relationship with the 18 year old respondent.

[21] The head note of this decision requires caution because it records as a proposition of the judgment rather than, as it was, a submission of counsel the proposition "It is in the nature of a guardian's responsibility to make decisions for the applicants in their best interests, and the guardian should be able to pursue an application for a protection order on behalf of minor applicants despite the minor's views to the contrary". Judge Mather's conclusion, as accurately set out later in the head note, was in fact that a "best interests" assessment similar to that required under s 23 of the Guardianship Act might lead to such a conclusion but "such a 'best interests' assessment is different from considering whether the respective 'interests' of the representative on one hand and the applicants on the other conflict or are adverse". The Judge in fact concluded:

> In those circumstances and without attempting to resolve the issue as to what might be said to be in the best interests of the applicants, on the undisputed affidavit evidence, I cannot say that there is unlikely to be any conflict between the interests of the representative and the interests of the applicants. Indeed on the face of it there is a direct conflict between those interests where the word 'interest' is interpreted in its wider sense, which in my view it should be.

[22] I agree with Judge Mather's view of the law.

[23] It is plain from the wording of s 9 of the Domestic Violence Act that the application being made is an application *by the minor* not by the representative. That appreciated, it would be a legal nonsense for the Court to appoint a person to make an application that a minor does not want or who would refuse to make an application which the minor does want.

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[1] 17 FRNZ 711

[24] The duty Judge's attention was not drawn to the decision in *W v B*, and even if it had been, it might well be that on the evidence available to him the appointment was justified. But the affidavit of the respondent and the affidavit in reply of the applicant, particularly in its annexed records of the contents of phone conversations between [Olivia] and [Faith] now make it more than sufficiently plain for the purposes of this judgment that [Olivia] does not want this application or the order.

[25] I therefore rescind the order made appointing Ms [Yates] [Olivia's] representative. The necessary consequence is that I rescind the temporary protection order.

[26] The application will therefore not advance unless and until an alternative representative is appointed by the Court.

D R Brown
Family Court Judge